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**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Intertec Aviation

File: B-239672; B-239672.2

Date: September 19, 1990

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DIGEST

Exclusion of proposal from the competitive range is not reasonable where the deficiencies cited are minor in relation to the scope of work and the revisions necessary to correct them; the deficiencies, in some cases, have been corrected during discussions but the corrections apparently have been overlooked; and discussions, in certain cases, were not sufficiently specific to advise offeror of the needed corrections.

DECISION

Intertec Aviation protests the Department of the Navy's exclusion of its proposal from the competitive range under request for proposals (RFP) No. N68520-89-R-0029. The RFP was issued by the Navy for various repair and maintenance programs for Navy and Air Force aircraft. Intertec contends that the deficiencies cited as the basis for the Navy's rejection of its proposal are minor and susceptible of correction, do not reflect the actual requirements under the solicitation, or are attributable to the agency's failure to conduct meaningful discussions with Intertec. We sustain the protest.

The RFP, issued on September 29, 1989, required offerors to submit six-volume proposals for the labor, materials, and facilities needed to accomplish standard depot-level maintenance, periodic depot maintenance, and mid-term inspection of Navy C-9B/DC-9 and Air Force C-9A aircraft. The RFP solicited a firm, fixed-price requirements contract. Award was to be made on the basis of the proposal offering

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the best value to the government, price and other factors considered. The proposals were to include a separate volume for each of the following areas: management/experience, production/facilities, quality, flight safety, industrial safety, and cost/price. These areas were listed in descending order of their importance for evaluation purposes with the first three approximately equal in weight. The RFP advised offerors that an unsatisfactory rating in any of the five technical areas would render the proposal unsatisfactory overall. In addition, each proposal was to be rated as presenting low, medium, or high risk. Technical proposals were to be evaluated separately from cost proposals.

Seven firms, including Intertec, submitted proposals by the closing date. The proposals were evaluated by the technical evaluation team (TET), which found all proposals to be unacceptable, but susceptible of being made acceptable with risk factors ranging from high to low. Intertec received a risk factor of medium. Requests for additional information were sent to all offerors with instructions to respond by April 10. Intertec responded with an initial submission on April 6, which it supplemented by facsimile on April 9. On April 7, the TET reconvened to evaluate the offerors' responses. After this evaluation, only two firms were found to be in the competitive range. The contracting officer informed Intertec by letter of April 18 that its proposal was "technically unacceptable and not capable of being made acceptable without a major rewrite," and that Intertec was therefore not in the competitive range.

Intertec protested this decision to the Navy by letter of April 25.^{1/} This protest, on the identical basis, followed. When this protest was filed, the Navy withheld awarding the contract pending the resolution of the protest, as required under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c) (1988). The Navy later determined, however, that urgent and compelling circumstances existed that significantly affect the interest of the United States,

^{1/} The Navy characterizes this submission as an administrative appeal rather than a protest and challenges the timeliness of Intertec's protest to us, which was not filed until May 14, on this basis. We find that the protester's submission to the agency on April 25 was a timely protest and that this protest was therefore also timely filed.

requiring the Navy to award the contract. In order to minimize the impact of awarding the contract in light of the pending protest, the Navy limited itself to issuing a delivery order for a maximum of two Air Force C-9 aircraft until the protest is resolved.

The contracting officer's decision to remove Intertec's proposal from the competitive range because the proposal allegedly would require a major rewrite in order to be considered acceptable was based on the TET's report of its final evaluation of the proposal. In addition to this report, the TET chairman summarized the team's evaluation for the contracting officer although she apparently did not receive this summary until after she had rejected Intertec's proposal. The TET chairman also prepared further comments about the evaluation in response to this protest. This document reduces the number of reasons for rejection and provides more specifics. In our discussion below, we primarily rely upon this last document as representing the agency's final position about the acceptability of Intertec's proposal.

The agency has identified eight alleged deficiencies that would require a major revision of Intertec's proposal in order to be considered acceptable.^{2/} The protester contends that the evaluation was unreasonable and does not support the rejection of Intertec's proposal.

The contracting officer is required by the Federal Acquisition Regulation (FAR) to include in the competitive range all proposals that have a reasonable chance of being selected for award. FAR § 15.609 (FAC 84-5). The record does not demonstrate a reasonable basis for the rejection of Intertec's proposal at this stage in the procurement. See Data Sys. Division of Litton Sys., B-208241, Sept. 29, 1982, 82-2 CPD ¶ 297.

In volume one, management/experience, the RFP listed eight topics, one of which was supply management. Under this heading, the RFP required offerors to describe the procedures and methods they would use to assure supply support would be accomplished in a timely and economic

^{2/} Although some 13 deficiencies were initially alleged, we find that only 8 remain in the latest report. The report concedes that two deficiencies alleged in the management/experience area met the requirements of the RFP, and one alleged in connection with a supplier quality assurance program was not unacceptable. We therefore need not discuss these.

manner, specifying 16 areas of supply. In the discussion questions that the Navy submitted to Intertec in response to its initial proposal, Intertec was instructed to clarify generally how it would meet the supply management requirement. The Navy now alleges that Intertec's proposal was deficient because it did not adequately address 1 of the 16 sub-areas, cannibalization procedures. The discussion questions had not given any indication that this particular aspect of Intertec's proposal was incomplete or otherwise deficient.

In this context, "cannibalization" refers to the use of parts from one aircraft to service another. Intertec's proposal labeled these procedures "robbed parts" and discussed them in volumes one and three. Although the TET chairman states in his response to the protest that no additional data on these procedures was included in Intertec's response to the discussion questions, we find that Intertec's initial proposal included procedures describing the steps required to "rob" an aircraft part, account for its removal, and control replacement action; it referenced the tags and forms that would be used in the process. The agency provides no explanation of why it finds that the information Intertec provided was insufficient. In the absence of such an explanation, we find no support for the agency's deficiency finding here, nor can we see why the alleged deficiency could be considered sufficiently material to warrant the rejection of the proposal.

In volume two, production/facilities, the RFP required offerors to submit information concerning nine different areas, one of which was bonded storage. The Navy's discussion questions directed Intertec to provide a detailed description of its bonded storage area dimensions and how it would be secured. The RFP required certain minimum storage requirements for different types of storage, which it listed by total square feet. The requirement called for 3,200 square feet of inside bin storage, 2,200 square feet of inside bulk storage and 5,000 square feet of outside bulk storage. Intertec's initial proposal provided approximate dimensions which met these minimum requirements. Although Intertec did not include the exact dimensions in its proposal, it did include the total square footage measurements to indicate that it met the RFP's stated requirement. It also included charts that showed the configuration and location of its storage areas. In response to the discussion question, Intertec reiterated its total dimensions but removed two references to the word "approximate" for inside and outside storage. The "approximate" dimension which remained exceeded requirements by 2,200 square feet. Although the TET report alleges that

the "response did not contain area dimensions of the bonded storage area," we fail to see what was lacking in Intertec's response.^{3/}

In another of the nine areas included in this volume, the RFP required a description of the offeror's facilities and procedures for liquid gaseous oxygen storage, servicing and purging. Intertec's initial proposal did not comply with this requirement and it was raised as a deficiency during discussions. In its initial response to discussion questions, Intertec stated that it did not possess the required liquid oxygen servicing capability. However, it revised this response in a facsimile transmission dated April 9, stating that it had located a liquid oxygen supplier and providing certifications for its personnel who had received liquid oxygen servicing training. The TET report continues, nonetheless, to state that Intertec would not have liquid oxygen capability and would not acquire the necessary equipment. In his conference comments, the TET chairman alleges that the supplemental response was not timely received,^{4/} and that it was in any case incomplete because it did not include safety, security, and quality program data.

^{3/} The TET chairman's comments also question when the storage area will be available. Intertec's initial proposal had acknowledged that it was in the process of refurbishing one of its hangars and that the improvements were scheduled to be completed by the time of the first scheduled aircraft arrival. Although it was not raised as a deficiency during discussions, this assurance was reiterated in Intertec's discussion response. The protester was never given any indication that this was a deficiency or that further assurances of timely completion were required. Further, Intertec was rated low risk for technical facilities.

^{4/} The protester's submission shows a transmission date of April 9 at 12:38 p.m. The deadline for receipt was April 10. The Navy does not discuss its allegation of untimeliness. It does not explain, for example, when it received the transmission or how it received the information if not on April 9. The record shows, on the other hand, that the TET reconvened on April 7 to begin evaluating Intertec's discussion responses, before the closing date and thus may have considered Intertec's revisions before the transmission arrived. We find no evidence in the record to support the claim of untimely receipt.

In our view, it is not reasonable to find that this lack of information was so material that it would require a major revision of the proposal or otherwise render the proposal unacceptable. Intertec's response proposed a subcontractor who could provide liquid oxygen and certifications for Intertec's personnel who had liquid oxygen servicing and handling training. Intertec also committed to add required safety, security, and quality programs. Since Intertec had personnel certified and experienced in handling liquid oxygen and a supplier, the omission of specific procedures for handling the liquid oxygen was informational only and readily correctable. We think this is especially true where, as here, Intertec's proposal contained procedures for handling materials including hazardous waste and explosives. Further, we reviewed in camera the two proposals that were found acceptable after discussions were held. One of these offerors also had failed to meet this requirement in its initial proposal. This firm's discussion response states that it, too, would provide liquid oxygen through another vendor. Although this offeror did include one sentence giving a very general description of its plans for storing the liquid oxygen when not in use, the remainder of its response appears to us no more complete than Intertec's. We therefore conclude that Intertec's response either was not unacceptable, or that it could be made acceptable with minimal corrections.

In volume three, quality, the RFP required offerors to address 11 separate areas relating to quality. One of these requirements was for a quality assurance plan, including a quality control/assurance procedures manual. The Navy's discussion questions alleged, generally, that Intertec had not complied with this requirement. The TET report alleged that Intertec's response had not shown compliance with paragraphs 3.3 and 3.5 of Mil-Q-9858A, and had not provided information about work instructions.

In its response to a discussion question in this area, the protester stated that "Intertec Aviation operates under written and documented quality procedures in conformance with MIL-I-45208A and MIL-Q-9858A, paragraphs 3.3 and 3.5, as required by the solicitation." Intertec also stated that the firm was prepared to confirm such compliance. The proposal included as an attachment its Inspection Policy and Procedures Manual, explaining the firm's internal inspection system in detail, and its Federal Aviation Authority Certified Repair Station Manual, which set forth the work instructions covering each of the 11 quality control/assurance areas. In its response to the discussion

questions, Intertec submitted cross-references to provisions of its repair station manual that cover the 11 quality-related requirements at issue. The protester argues that if the agency's criticism is that the work instructions were to be collected in a separate manual, it would be a simple process to spell out the instructions that were referenced, and would not require a rewrite of the proposal. We note that the RFP limited this portion of proposals (which included 11 topics) to 60 pages and stated that manuals could be submitted as an attachment.

The agency's criticism of Intertec's proposal in this area does not appear to relate to the protester's understanding of the requirement, but only to the manner of implementation. We do not see why the preparation of a separate manual should be considered material under these circumstances, and the agency has failed to show why the information submitted in the proposal as revised was not sufficient.

The next deficiency alleged was that the proposal did not address the methods or procedures for responding to customer deficiency reports as required under the RFP. Intertec's initial proposal included relevant information in a section entitled "Customer Liaison Program," and in its "Corrective Action & Disposition" section, where it set forth the protester's policies and procedures for corrective action to identify, segregate and properly dispose of nonconforming material and to ensure that positive corrective action is taken to prevent, minimize and eliminate nonconformances in the workstation. It did not, however, include a separate section addressing customer deficiency reporting. In discussion questions, Intertec was asked to provide its methods/procedures for responding to customer deficiency reports. Intertec responded by referring to the program it had described in its initial proposal.

While Intertec's response in this area appears less than complete, the Navy considered Intertec's customer liaison program to be a particular strength in its initial evaluation. Its failure to separately address one procedure, which relates to one subpart of one of 11 topics under the area of quality, does not seem to reasonably support the rejection of its proposal. We found that one of the other initial proposals of a firm subsequently found acceptable also failed to address this matter to the Navy's satisfaction; that offeror's discussion response referred to two paragraphs in the offeror's standard practice instructions relating to nonconforming materials. We cannot see any material difference between the two proposals in this respect. The other acceptable proposal covered this

topic in some six sentences in its initial submission. In short, we do not find that the Navy had a reasonable basis for rejecting Intertec's proposal because of its response in this area.

For volume four, flight safety, the RFP required offerors to submit a plan for a comprehensive aviation safety program. Offerors were required to provide an Air Operations Manual, the detailed standard for which was contained in this section of the RFP. In discussion questions, the agency asked Intertec to clarify how its proposal met the RFP requirements in some areas in which Intertec allegedly had not provided sufficient information (planning and mission procedures, pre-mishap plan procedures and compliance with NAVAIR instructions). Intertec in its protest referred to the areas in its proposal where this information appears. The TET chairman responds in a rather general manner that "it was the judgment of the Government Flight Representative that Intertec did not either address/provide any information or did not provide adequate information to ensure that it had the correct procedures and met the requirements of the RFP. . . . Although Intertec may be an FAA Repair Station, [this] does not mean this meets all the requirements of the RFP." The only deficiency specifically raised in the agency comments is the allegation that Intertec failed to address pilot certification and training. However, amendment Nos. 1 and 2 to the RFP state that the Navy and Air Force would provide the pilots and flight crews required, rather than the contractor. Thus, pilot certification and training procedures were not required under the RFP and, in any event, the issue was never raised during discussions. We again fail to see how this could constitute a material deficiency which justified rejection of the offer.

In volume five, industrial safety, the RFP required offerors to address 10 separate topics. For one topic, offerors were to provide information on the qualifications, certification, and training program of personnel involved in engine runs, aircraft taxi operations, aircraft tow operations and servicing operations. The Navy's discussion questions required Intertec to clarify, generally, how its procedures in this area met the requirements of the RFP. Intertec's initial proposal had provided the rather general information that its personnel receive safety training as part of their initial employment processing; it did not address the qualifications and training for these particular personnel in this volume. However, in volume four, flight safety, it did address training and testing requirements for ground personnel, as well as the record-keeping procedures involved. In its response to the discussion question, Intertec stated that it is developing a formal program for

run-up, taxi, and towing procedures and certification, and that it would be incorporated into its Repair Station Manual. The response stated that qualified personnel are individually trained and certified by each air carrier or customer, as required, rather than under a formal program. The response also indicated that Intertec maintains training and certification records. The TET comments allege that the proposal is deficient because it did not indicate compliance with the requirements of NAVAIRINST 3710.7 "as specified in the RFP."^{5/} While a discussion question requested evidence that Intertec's flight operations manual met the requirements of the instruction, there was no discussion question or RFP requirement, for that matter, under industrial safety requiring compliance with this instruction. The agency has not shown any specific deficiency based on this instruction or that any information needed would require a major rewrite of Intertec's proposal.

Also included in this volume was a requirement for a plan for the fire protection systems and fire fighting equipment for the offeror's facilities. The discussion question referred to this requirement and generally requested evidence of compliance. Intertec's initial proposal stated that its fire protection system is in compliance with all state and local requirements. It explained that the facility is owned by the City of Phoenix and that the Goodyear/Phoenix Fire Department provides on-call fire protection services and inspects Intertec's fire procedures, facilities and fire-fighting equipment and systems. It provided additional details in response to the discussion question and provided a fire protection system diagram. The TET comments report, however, that Intertec failed to demonstrate its fire protection system's compliance with NAVAIR 00-80R-14, which governs aircraft hangars. Intertec did not specifically mention this standard.

The protester argues that it met the substance of the requirement, and that any failure to exactly meet this requirement, which was a subportion of one of 10 separate requirements in the area of industrial safety, the least important of all five technical areas, cannot reasonably be considered to be of such weight that it renders the proposal


^{5/} Naval Instruction 3710.7 provides requirements for flight operations and other tasks at an aircraft maintenance facility.

technically unacceptable and not susceptible of correction. In the absence of any explanation from the agency about what the protester's proposal specifically lacked, we also fail to find a material deficiency incapable of correction here.

At a bid protest conference held in our office, the protester discussed each of the deficiencies cited in the agency's protest report. The Navy was asked to respond to the protester's general complaint that none of the deficiencies were material or of such magnitude to render the entire proposal unacceptable and not susceptible of being made acceptable. The agency has declined to further elaborate on this issue, stating that its grading of all proposals for this acquisition followed the procedures in the source selection plan and applied the evaluation criteria uniformly and fairly to all offerors. The Navy asserts that the protester has failed to meet its burden of showing that the agency's conduct in the source selection process was so arbitrary and capricious or so inherently unfair to the protester that an overturning of the agency's judgment is warranted.

We find that the record does not provide a reasonable basis for the Navy's finding that Intertec's proposal was so deficient that it had no reasonable chance of award. We point out, in this connection, that the five technical volumes of material that were submitted were in excess of 300 pages, plus attachments; the discussion responses increased the total submission by approximately 50 percent. The agency's evaluation shows that the vast majority of this information met the RFP standards. While we do not offer any comment on the technical merit of the protester's proposal, based on the record we find that the deficiencies that the Navy attributes to Intertec's proposal are relatively minor, both individually and collectively, in relation to the scope of work and the extent of revisions necessary to correct them. Moreover, the competition is seriously diminished by the exclusion of one offeror when that exclusion leaves only two firms in the competitive range. Also Intertec's proposal offered a price that was competitive with the two firms that remained in the competition.

We recommend that the Navy reopen negotiations with Intertec included in the competitive range and then request a new round of best and final offers. Following evaluation, the Navy should terminate the contract it already awarded, if appropriate.^{6/} Further, we find that Intertec is entitled to the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990); see Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

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^{6/} Intertec also protests the agency's failure to notify the firm that it was proceeding with the award for two aircraft pending resolution of this protest. By letter of August 6, 1990, we were advised that the agency intended to proceed with award of delivery orders for maintenance on two aeromedical evacuation aircraft for urgent and compelling reasons. The agency reported that the aircraft would be grounded for safety reasons because required maintenance cannot be accomplished. We have no reason to object to this determination and therefore our recommendation pertains to all further delivery orders under the contract.